Supreme Court, U.S.
FILED
AUG 6 2001
CLERK

(2)

No. 00-1872

In the Supreme Court of the United States

ROY NESET, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

STUART E. SCHIFFER
Acting Assistant Attorney General

JACOB M. LEWIS
MARK S. DAVIES
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

23 pp

QUESTION PRESENTED

Whether a person engaged in unlicensed, low power radio broadcasts can raise, as a defense to an action for an injunction brought by the government in district court, the alleged invalidity of the Federal Communications Commission's regulations concerning low power radio stations.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations, In re, 69 F.C.C.2d 240 (1978), aff'd on recons., 70 F.C.C.2d 972 (1979)	4
Columbia Broad. Sys., Inc. v. *United States*, 316 U.S. 407 (1942)	2, 8, 9
Creation of Low Power Radio Service, In re, 15 F.C.C.R. 2205 (rel. Jan. 27, 2000), aff'd on recons., FCC 00-349 (rel. Sept. 28, 2000)	6
Creation of a Low Power Radio Service, Second Report and Order, F.C.C. 01-1000 (Apr. 2, 2001)	7, 17
Dougan v. *FCC*, 21 F.3d 1488 (9th Cir. 1994)	15
FCC v. *ITT World Communications, Inc.*, 466 U.S. 463 (1984)	5, 8-9
La Voz Radio de La Communidad v. *FCC*, 223 F.3d 313 (6th Cir. 2000)	15, 16
National Broad. Co. v. *United States*, 319 U.S. 190 (1943)	13
Prayze FM v. *FCC*, 214 F.3d 245 (2d Cir. 2000)	14, 15
Red Lion Broad. Co. v. *FCC*, 395 U.S. 367 (1960)	13
Telecommunications Research and Action Ctr. v. *FCC*, 750 F.2d 70 (D.C. Cir. 1984)	11
Time Warner Entm't Co. v. *FCC*, 93 F.3d 957 (D.C. Cir. 1996)	17

Cases—Continued: Page

Turner Broad. Sys., Inc. v. *FCC*, 512 U.S. 622 (1994) 13
Turro v. *FCC*, 859 F.2d 1498 (D.C. Cir. 1988) 10
United States v. *Any and All Radio Station Transmission Equipment (Fried)*, 207 F.3d 458 (8th Cir. 2000), cert. denied, 121 S. Ct. 761 (2001) .. 5, 7, 8, 9, 12, 14, 16
United States v. *Any and All Radio Station Transmission Equipment (Perez)*, 204 F.3d 658 (6th Cir. 2000) 12, 13, 14, 15, 16
United States v. *Any and All Radio Station Transmission Equipment (Strawcutter)*, 218 F.3d 543 (6th Cir. 2000) 11, 13
United States v. *Dunifer*, 997 F. Supp. 1235 (N.D. Cal. 1998), aff'd, 219 F.3d 1004 (9th Cir. 2000) 5, 10, 15
United States v. *Szokai*, No. 99-02008, 2001 Fed. App. 0245P (6th Cir. July 30, 2001) 16
Wisniewski v. *United States*, 353 U.S 901 (1957) 15

Statutes, regulations, and orders:

Act of Dec. 21, 2000 (Broadcasting Preservation Act), Pub. L. No. 106-553, § 632, 114 Stat. 2762A-111 ..... 6, 17
Communications Act of 1934, 47 U.S.C. 101 *et seq.*:
47 U.S.C. 154(i) 2
47 U.S.C. 301 ..... 2, 3, 4, 6, 12, 17
47 U.S.C. 307(a) 2
47 U.S.C. 312 (1994 & Supp. V 1999) 3
47 U.S.C. 401(a) (1994) 3, 11
47 U.S.C. 402 (1994 & Supp. V 1999) 4, 8, 17
47 U.S.C. 402(a) 2, 8, 9, 10, 11
47 U.S.C. 402(b) (1994 & Supp. V 1999) 2, 3, 8
47 U.S.C. 402(b)(1) (1994 & Supp. V 1999) 10
47 U.S.C. 501 3
47 U.S.C. 503 3
47 U.S.C. 510 3
Hobbs Administrative Orders Review Act, 28 U.S.C. 2342 (1994 & Supp. V 1999) 2, 4, 8

Regulations and orders—Continued: Page

47 C.F.R.:
Section 1.401(a) 10, 11
Section 15.239(b) 4
FCC Broadcast Actions, Report No. 44965 (actions of Apr. 12, 2001) 17

In the Supreme Court of the United States

No. 00-1872

ROY NESET, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 235 F.3d 415. The opinion of the district court (Pet. App. A16-A26) is reported at 10 F. Supp. 2d 1113.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 2000. A petition for rehearing was denied on March 15, 2001 (Pet. App. A27). The petition for a writ of certiorari was filed on June 13, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Communications Act of 1934 (Communications Act or Act) seeks "to maintain the control of the United States over all the channels of radio transmission." 47 U.S.C. 301. The Act therefore provides that "[n]o person shall use or operate any apparatus for the transmission of * * * signals by radio" without "a license in that behalf granted under the provisions of this [Act]." *Ibid.* The Act authorizes the Federal Communications Commission (FCC or Commission) to grant radio licenses when it finds that the "public convenience, interest, or necessity will be served thereby." 47 U.S.C. 307(a). The Act also authorizes the Commission to issue rules and regulations regarding license applications and orders regarding specific license applications. 47 U.S.C. 154(i).

Section 402(a) of Title 47 of the United States Code specifies that any challenge to the validity of an FCC rule or regulation must be brought under the Hobbs Administrative Orders Review Act, 28 U.S.C. 2342 (1994 & Supp. V 1999), which in turn provides that the courts of appeals have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. 2342 (1994 & Supp. V 1999). See also *Columbia Broad. Sys., Inc.* v. *United States*, 316 U.S. 407, 425 (1942) (FCC's promulgation of regulations is an order reviewable under Section 402(a)). Section 402(b) of Title 47 further provides that the United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to review FCC orders regarding individual license applications,

modifications, revocations, or suspensions. 47 U.S.C. 402(b) (1994 & Supp. V 1999).

The Communications Act provides a number of mechanisms to enforce its licensing requirement, including cease-and-desist orders (47 U.S.C. 312 (1994 & Supp. V 1999)), monetary and in rem forfeitures (47 U.S.C. 503, 510), and criminal penalties (47 U.S.C. 501). The Act also authorizes the government to seek injunctive relief by granting jurisdiction to the district courts, "upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter." 47 U.S.C. 401(a) (1994).

2. In 1997, the FCC received a complaint from an AM radio station in Tioga, North Dakota, that petitioner was engaged in unlicensed broadcasting in the Tioga area at a frequency of 88.1 MHz. Pet. App. A3. The FCC sent petitioner a warning letter, which informed him that 47 U.S.C. 301 prohibits broadcasting without a license. *Ibid.* Petitioner refused to stop broadcasting. *Ibid.*

After FCC officials determined that petitioner's signal exceeded the blanket license permitted under Part 15 of the FCC's regulations, Pet. App. A3-A4, the United States filed suit in federal district court to enjoin petitioner from broadcasting without a license in violation of 47 U.S.C. 301. Pet. App. A4. In his answer, petitioner admitted that he had engaged in radio broadcasting and that he had not applied to the FCC for a license or for a waiver of the Communications Act's licensing requirements. *Ibid.* Nevertheless, he opposed the government's request for an injunction on

the ground that the FCC's regulations, which at that time prohibited the licensing of low power radio stations such as petitioner's, violated his rights under the First Amendment and other constitutional and statutory provisions. *Id.* at A18.[1]

The district court granted the government's request for an injunction. Pet. App. A16-A26. The court found that "it cannot be disputed that [petitioner] has violated the licensing requirement of 47 U.S.C. § 301." *Id.* at A18. The court concluded that petitioner "has made low-power radio transmissions in excess of the exemption limits provided by 47 C.F.R. § 15.239(b) so that [petitioner] is required to have a license in making such transmissions, and * * * [petitioner] has violated [the licensing requirement of] 47 U.S.C. § 301." Pet. App. A18. In addition, the court ruled that it did not have subject matter jurisdiction over petitioner's statutory defenses in light of 47 U.S.C. 402 and 28 U.S.C. 2342 (1994 & Supp. V 1999), which vests in the courts of appeals exclusive jurisdiction to review "all policies,

---

[1] Petitioner used a one-watt transmitter with a 30-watt amplifier to broadcast a signal that could be heard at a range of about 5 miles from his property. Pet. App. A3. In 1997, when this dispute arose, the Commission generally would not license low power radio stations, *i.e.*, stations operating at under 100 watts. Until 1978, the Commission had licensed low power (typically 10-watt) educational stations. In 1978, however, the Commission explained that it would no longer license such stations because they "function in a manner which defeats the opportunity for other more efficient operations which could serve larger areas, and bring effective noncommercial educational radio service to many who now lack it." *In re Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations*, 69 F.C.C.2d 240, 248 (1978), aff'd on recons., 70 F.C.C.2d 972, 973 (1979). The Commission has since abandoned its policy against licensing low power radio stations and established a system for licensing them. See p. 6, *infra*.

practices and regulations adopted by the FCC." Pet. App. A19. Finally, relying on *United States* v. *Dunifer*, 997 F. Supp. 1235 (N.D. Cal. 1998), aff'd, 219 F.3d 1004 (9th Cir. 2000), the court held that petitioner did not have standing to raise an as-applied constitutional challenge to the FCC's low power rules because he had never applied for a broadcast license, and any claim that the rules were unconstitutionally overbroad failed because the regulatory scheme set forth procedures for the agency to follow and provided for judicial review of any ruling. Pet. App. A20-A23.

3. The United States Court of Appeals for the Eighth Circuit affirmed. Pet. App. A1-A15. Relying on its prior decision in *United States* v. *Any and All Radio Station Transmission Equipment* (*Fried*), 207 F.3d 458 (2000), cert. denied, 121 S. Ct. 761 (2001), the appeals court held that "the district court lacked subject matter jurisdiction over [petitioner's] affirmative defenses attacking the validity of the microbroadcasting regulations." Pet. App. A13. The court of appeals reiterated, as it had in *Fried*, that "the exclusive jurisdiction of the Court of Appeals over rulemaking * * * may not be evaded by seeking to enjoin a final order of the FCC in the district court." *Ibid.* (quoting *Fried*, 207 F.3d at 463) (citing *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984)). The court also stated that "[petitioner's] defensive attack on the validity of the microbroadcasting regulations would be just as much 'an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction.'" *Ibid.* (quoting *Fried*, 207 F.3d at 463).

The court of appeals also ruled that "the district court did not abuse its discretion in permanently enjoining [petitioner] from broadcasting without a license" because "[t]he record established that [peti-

tioner] was broadcasting without a license or a waiver in violation of the Communications Act, as amended." Pet. App. A14. It therefore affirmed the district court's judgment. *Ibid.*[2]

The court of appeals, with four judges dissenting, denied petitioner's request for en banc review. Pet. App. A27.

4. After the events at issue in this case, the Commission determined that low power stations that meet certain conditions will not interfere with existing full power FM stations. It therefore issued new rules establishing two classes of low power noncommercial radio stations, one at a maximum of 100 watts and one at a maximum of 10 watts. *In re Creation of Low Power Radio Service*, 15 F.C.C.R. 2205 (rel. Jan. 27, 2000), aff'd on recons., FCC 00-349 (rel. Sept. 28, 2000). A petition to review the FCC's low power rules is pending before the United States Court of Appeals for the District of Columbia Circuit. *National Ass'n of Broad.* v. *FCC*, No. 00-1054 (argued Nov. 28, 2000).

Subsequently, Congress passed the Act of December 21, 2000, Pub. L. No. 106-553, § 632, 114 Stat. 2762, 2762A-111 (2000) (Broadcasting Preservation Act). In that Act, Congress ordered the FCC to modify its low power rules in certain ways, including to "prohibit any applicant from obtaining a low-power FM license if the applicant has engaged in any manner in the unlicensed operation of any station in violation of [47 U.S.C.] section 301." § 632(a)(1)(B), 114 Stat. 2762A-111. On

---

[2] Judge Heaney dissented. In his view, "district courts in this type of case have jurisdiction to hear First Amendment challenges to the Federal Communications Commission's prohibition of microbroadcasting in the context of an enforcement action filed against them." Pet. App. A15.

April 2, 2001, the Commission issued rules implementing the Broadcasting Preservation Act, including the disqualification of unlicensed broadcasters. See *Creation of a Low Power Radio Service*, Second Report and Order, FCC 01-1000, ¶¶ 10-11.[3]

ARGUMENT

On January 8, 2001, this Court denied certiorari in *United States* v. *Any and All Radio Station Transmission Equipment (Fried)*, 207 F.3d 458 (8th Cir. 2000), the decision upon which the court of appeals relied in this case. See 121 S. Ct. 761 (2001). The decision in this case presents issues essentially the same as those that were presented in *Fried*, and there have been no subsequent developments that would strengthen the basis for certiorari. Accordingly, the Court should deny the petition in this case.

1. a. The court of appeals correctly affirmed the district court's conclusion that it lacked jurisdiction to entertain petitioner's First Amendment challenge to the FCC's licensing regulations.[4] As the court of

---

[3] By order dated January 8, 2001, the District of Columbia Circuit ordered the parties in the *National Association of Broadcasters* case to file supplemental briefs addressing the constitutionality of the Broadcasting Preservation Act's disqualification of unlicensed broadcasters. The court has set the matter for argument on September 6, 2001.

[4] As we have noted above, in the district court, petitioner challenged the regulations on a variety of constitutional and statutory grounds. See p. 4, *supra*. His petition for a writ of certiorari, however, concerns only his First Amendment challenge. See Pet. i (referring to "a constitutional defense"; *id.* at 10 (describing "the issue presented" as "whether the federal district courts have jurisdiction to consider the constitutionality of FCC regulations"); *id.* at 22-23 (relying on the importance of the First Amendment issues at stake to support the request for review).

appeals held, the Communications Act confines review of FCC regulations to the courts of appeals. See Pet. App. A12-A13.

The Communications Act expressly provides that "*[a]ny* proceeding to enjoin, set aside, annul, or suspend *any order* of the Commission under this chapter (except those appealable under subsection (b) of this section[5]) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28." 47 U.S.C. 402(a) (emphasis added). That chapter in turn provides, in relevant part, that "[t]he court of appeals (other than the United States Court of Appeals for the Federal Circuit) has *exclusive jurisdiction* to enjoin, set aside, suspend (in whole or in part), or *to determine the validity of*—(1) *all final orders* of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. 2342(1) (emphasis added). This Court long ago held that "the Commission's promulgation of [its] regulations is an order reviewable under [47 U.S.C.] 402(a)." *Columbia Broad. Sys., Inc.* v. *United States*, 316 U.S. 407, 425 (1942). As the Eighth Circuit earlier concluded, "[i]t is hard to think of clearer language confining the review of regulations to the Courts of Appeal[s]." *Fried*, 207 F.3d at 463.

Moreover, as the court of appeals noted (Pet. App. A13), this Court has held that the exclusive jurisdiction of the courts of appeals over FCC rulemaking may not be evaded by seeking to enjoin a final order of the FCC in the district court. See *FCC* v. *ITT World*

---

[5] Subsection (b) of 47 U.S.C. 402 gives the United States Court of Appeals for the District of Columbia Circuit jurisdiction over FCC orders regarding individual license applications, modifications, revocations, or suspensions. 47 U.S.C. 402(b) (1994 & Supp. V 1999).

Communications, Inc., 466 U.S. 463, 468 (1984). See also *Fried*, 207 F.3d at 463. "A defensive attack on the FCC regulations is as much an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction." Pet. App. A13 (quoting *Fried*, 207 F.3d at 463). Therefore, in this case, just as in *ITT*, the only "appropriate procedure for obtaining judicial review of the agency's [regulatory actions] was appeal to the Court of Appeals as provided by statute." 466 U.S. at 468.

As the court of appeals recognized in *Fried*, the statutory scheme's requirement of an initial regulatory decision by the Commission followed by review in the court of appeals makes eminent sense. 207 F.3d at 463. It "ensure[s] review based on an administrative record made before the agency charged with implementation of the statute." *Ibid.* In addition, it "ensure[s] uniformity of decisionmaking because of uniform fact-finding made by the agency." *Ibid.* Finally, it "bring[s] to bear the agency's expertise in engineering and other technical questions." *Ibid.*

b. Petitioner mistakenly claims (Pet. 17-18) that Section 402(a) is not applicable to his challenge because the FCC has not issued an "order" from which he could appeal. Contrary to petitioner's contention that "the F.C.C. regulatory scheme disallowing micro-broadcasting does not constitute an appealable 'order' under § 402(a)" (Pet. 17), the promulgation of regulations is (as we have explained above) an "order" within the meaning of Section 402(a). See *Columbia Broad. Sys.*, 316 U.S. at 425. Petitioner's lack of standing to challenge those regulations directly (see Pet. 17) does not negate the existence of an "order" triggering the applicability of Section 402(a).

To the extent that petitioner's argument is based on the absence of any order that he personally can appeal at this time, petitioner himself is responsible for that situation. He could have petitioned the FCC for a rulemaking to repeal or modify its low power broadcasting regulations. See 47 C.F.R. 1.401(a) (providing that "[a]ny interested person may petition for the issuance, amendment or repeal of a rule or regulation" of the Commission). If the Commission denied the request, or granted it in a manner that aggrieved petitioner, he could have appealed that order to the court of appeals in accordance with Section 402(a).

In the alternative, petitioner could have raised his challenge to the FCC's low power broadcasting policies by filing an application for a broadcast license, accompanied by a request for a waiver of the FCC's low power regulations. If the Commission denied his application and request for waiver, petitioner could then have appealed the denial to the United States Court of Appeals for the District of Columbia Circuit, where he could have asserted that the regulations were constitutionally invalid. See 47 U.S.C. 402(b)(1) (1994 & Supp. V 1999); note 5, *supra*. See generally *Turro* v. *FCC*, 859 F.2d 1498, 1499 (D.C. Cir. 1988). The fact that petitioner sought to bypass the Communication Act's judicial review procedures cannot vest the district courts with jurisdiction to review FCC rules in contravention of the Act's command that review of those rules is the exclusive province of the courts of appeals. See *United States* v. *Dunifer*, 219 F.3d 1004, 1007 (9th Cir. 2000).

There is also no merit to petitioner's claim (Pet. 21) that the Commission could use the waiver process to insulate "blatantly unconstitutional regulations" from review. The FCC's failure to act on a license application or waiver in a timely manner is subject to review

by mandamus in the court of appeals. See *Telecommunications Research and Action Ctr.* v. *FCC*, 750 F.2d 70 (D.C. Cir. 1984). Furthermore, as we have explained, someone who wants to make a constitutional challenge to an existing regulation can do so by filing a petition requesting the FCC to repeal the objectionable regulation, see 47 C.F.R. 1.401(a), and may obtain judicial review of the Commission's action on that petition in the court of appeals, 47 U.S.C. 402(a).

c. Petitioner also errs in contending (Pet. 16-17) that the decision in this case is inconsistent with 47 U.S.C. 401(a), which vests jurisdiction in the district courts to grant the government's request for an injunction against a violation of the Communications Act. Contrary to petitioner's contention that Section 401(a) permits him to "assert all available defenses" in the district court (Pet. 17), that provision does not address the defenses that can be raised, much less suggest that the district court is empowered to address the validity of FCC rules. In any event, the invalidity of the FCC's low power broadcasting regulations would not undermine the basis for the government's injunction, which is that petitioner chose to broadcast without obtaining a license as required by the Act. See *United States* v. *Any and All Radio Station Transmission Equipment (Perez)*, 218 F.3d 543, 549-550 (6th Cir. 2000) (holding that First Amendment does not provide a defense to the forfeiture of radio equipment used in unlicensed low power broadcasting).

Petitioner's assertion (Pet. 18) that the decision of the court of appeals "departs from established federal jurisdiction and standing principles when a party faces an enforcement action brought by the government" is unfounded. Petitioner's sole support for that proposition (see Pet. 19) is a single sentence from a treatise on

federal courts that does not address the question at issue here—whether a defendant in an enforcement action can raise an issue in that action when resolution of that issue is committed by statute to another forum and the defendant has bypassed available opportunities to raise the issue in the forum to which it is statutorily committed.

2. Petitioner asserts (Pet. 10-15) that there is a conflict between the decision in this case and the Sixth Circuit's decision in *United States* v. *Any and All Radio Transmission Equipment (Strawcutter)*, 204 F.3d 658 (2000). There, the Sixth Circuit concluded that a district court may, in ruling on a forfeiture action against radio equipment used for unlicensed broadcasting, consider whether the low power regulations are unconstitutional. *Id.* at 667. Although there is tension between the two cases,[6] as in *Fried*, this Court's review is not warranted at this time.

a. First, this case is not an appropriate one in which to resolve the disagreement among the courts of appeals, because resolution of that disagreement will not affect the ultimate outcome of this litigation. The asserted invalidity under the First Amendment of the FCC's low power broadcast regulations is not a defense to an action to enforce the Communications Act's licensing requirements.

---

[6] There is not a square conflict between this case and *Strawcutter* because this case involves the government's suit for an injunction and *Strawcutter* involved a suit for forfeiture of radio equipment. In both cases, however, the government was invoking statutorily-authorized remedies intended to foreclose unlicensed broadcasting in violation of 47 U.S.C. 301. And *Fried*, the decision on which the court of appeals relied in this case, was (like *Strawcutter*) an appeal from an *in rem* forfeiture. See Pet. App. A13.

It has long been settled that the Act's prohibition on broadcasting without a license does not violate the First Amendment. *National Broad. Co.* v. *United States* (*NBC*), 319 U.S. 190, 227 (1943) ("The right of free speech does not include * * * the right to use the facilities of radio without a license."); see also *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 638 (1994); *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 388-389 (1969). Indeed, petitioner conceded in the district court (Pet. App. A20) that the Communications Act's licensing requirement is valid. Thus, even if petitioner is correct that he would qualify for a license but for an unconstitutional impediment to his receiving one, he still has no entitlement to broadcast without one. If the rule were otherwise, the "confusion and chaos" that was characteristic of the airwaves before effective government regulation—in which, with "everybody on the air, nobody could be heard," *NBC*, 319 U.S. at 212—would necessarily reappear because of the inevitable interference.

Strawcutter itself and a subsequent Sixth Circuit decision support that conclusion. The court noted in *Strawcutter* that "[t]he district court may have been right when it concluded that even if the challenged regulation is unconstitutional, the statute is valid, and that [the broadcaster's] violation of the statute is the beginning and end of the government's forfeiture case." 204 F.3d at 668. And, in *United States* v. *Any and All Radio Station Transmission Equipment (Perez)*, 218 F.3d 543, 549-550 (2000), the Sixth Circuit affirmed a district court's ruling that the First Amendment did not provide a defense to forfeiture of radio equipment used in unlicensed low power broadcasting. The court stated: "Because [the claimant] does not have a First Amendment right to broadcast his views on an un-

licensed radio station, this argument does not present a defense to forfeiture." *Id.* at 549-550.

In sum, as a practical matter, it makes no difference which court has jurisdiction over petitioner's challenge to the FCC's regulations, because that challenge cannot immunize petitioner from the consequences of his violation of the Act's licensing requirement.[7]

b. This Court's resolution of the disagreement among the courts of appeals is also not necessary at this time because there is reason to believe that the Sixth Circuit may reconsider its current position. In *Strawcutter*, the Sixth Circuit adopted Judge Morris Arnold's concurrence in the original panel opinion in *Fried*. See 204 F.3d at 667. One month after the *Strawcutter* decision was issued, however, Judge Arnold and Judge McMillian voted to vacate the prior opinions (including Judge Arnold's concurrence) and to affirm the district court in accordance with the views of Judge Noonan. Pet. App. A9-A10; see 207 F.3d at 462-463. It is possible, given the Eighth Circuit's reversal of position, that the Sixth Circuit will likewise reconsider its view when presented with an appropriate opportunity.

---

[7] Indeed, it is precisely because the outcome on the merits of this sort of case is so clear that the Second Circuit recently avoided resolving the jurisdictional issue. *Prayze FM* v. *FCC*, 214 F.3d 245, 251 (2000). See Pet. 11 n.2. In *Prayze*, the Second Circuit affirmed the grant of a preliminary injunction against an unlicensed low power broadcaster. The court declined to "resolve the jurisdictional question" because, "even assuming" that the district court would have jurisdiction to evaluate the constitutionality of the low power regulations, the FCC had demonstrated that it would likely prevail. See 214 F.3d at 251. Because the unlicensed broadcaster's attack on the low power rules lacked merit, the Second Circuit saw no need to resolve the disagreement identified by petitioner. *Ibid.*

For that reason, two courts of appeals have questioned the continuing vitality of the *Strawcutter* opinion. The Second Circuit, for example, noted the decision in *Strawcutter* but observed that "in reaching that result the Sixth Circuit relied in relevant part on an Eighth Circuit opinion that was superseded." *Prayze*, 214 F.3d at 251. Similarly, the Ninth Circuit, after explaining that it found the reasoning of the court of appeals in *Fried* "persuasive," cited *Prayze*, "pointing out the Sixth Circuit's reliance on now out-of-date Eighth Circuit case law." *United States* v. *Dunifer*, 219 F.3d 1004, 1007 & n.7 (9th Cir. 2000).[8]

Further doubt as to the vitality of the Sixth Circuit's position has also been created by *La Voz Radio de La Communidad* v. *FCC*, 223 F.3d 313, 318 (2000), in which the Sixth Circuit held that a district court lacked jurisdiction to consider the validity of the FCC low power rules in the context of a lawsuit for injunctive relief initiated by the broadcaster. The *La Voz* court distinguished *Strawcutter* on the ground that in *Strawcutter* there was no final order, the rationale offered by Judge Arnold's concurring opinion. 223 F.3d at 320.

---

[8] Petitioner also contends (Pet. 16 n.5) that the Ninth Circuit case law relating to the issue presented by this case is "unsettled." Petitioner relies for that contention on *Dunifer* and on *Dougan* v. *FCC*, 21 F.3d 1488, 1491 (9th Cir. 1994), in which the court of appeals denied a petition to review an FCC monetary forfeiture order on the ground that the district court is the proper court to consider the validity of forfeiture orders. The Ninth Circuit in *Dunifer* reiterated, however, that *Dougan* remains good law "at least with respect to monetary forfeitures," 219 F.3d at 1007 n.6. Thus, that circuit's case law is not unsettled. In any event, any disagreement within the Ninth Circuit would not warrant review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

The Eighth Circuit's subsequent decision to abandon that rationale calls into question the distinction relied upon by the Sixth Circuit in *La Voz*.

Finally, the Sixth Circuit recently declined to extend *Strawcutter* to the situation in which the FCC seeks an injunction to enforce a previously issued cease and desist order. See *United States* v. *Szoka*, No. 99-02008, 2001 Fed. App. 0245P (July 30, 2001), *available at* http://pacer.ca6.uscourts.gov/cgibin/getopn.pl?OPINION=01a0245p.06 (visited July 30, 2001), at 7-10. Although the court of appeals noted that its "holding is not meant to cast any doubt on the court's prior holding in *Strawcutter*," the court expressly "reserve[d] for another day" the question presented in this case and "in *Fried*"—"whether a broadcaster can raise constitutional arguments to the district court in defense against the government's motion for an injunction when an FCC cease and desist order has not previously been issued." *Id.* at 13 n.13. Thus, the Sixth Circuit has left open the possibility that it will reconsider its reasoning in *Strawcutter*, at least in the factual context presented here. Moreover, the fact that *Strawcutter* has not been applied by the Sixth Circuit to actually invalidate a forfeiture on the merits further diminishes that decision's precedential force.

c. Two final considerations counsel against review by this Court at this time. The first is the FCC's adoption of rules authorizing low power broadcasting. See p. 6, *supra*. That action may significantly reduce the number of FCC enforcement actions. As petitioner emphasizes (Pet. 7-8), in the past many individuals may have felt frustrated with the agency's flat prohibition on low power broadcasting. Now, however, the FCC has established a regulatory regime, in accordance with the Broadcasting Preservation Act, that permits low

power licensing in appropriate circumstances and has begun to issue construction permits for low power stations under its new rules. FCC Broadcast Actions, Report No. 44965 (actions of Apr. 12, 2001) (granting 25 low power permits) (*available at* http://www.fcc.gov/Bureaus/Mass_Media/Public_Notices/ Brdcst_Actions/ac010417.txt) (visited July 30, 2001). The FCC's new low power rules may therefore substantially reduce the future significance of this case, which arose under the prior regulatory regime.

Second, petitioner's ineligibility for a low power FM license is now a result of statute. Under the Broadcasting Preservation Act, the Commission is required to preclude any applicant from obtaining a low power FM license if that applicant has "engaged in any manner in the unlicensed operation of any station in violation of [47 U.S.C.] section 301." Pub. L. No. 106-553, § 632(a)(1)(B), 114 Stat. 2762A-111. See *Creation of a Low Power Radio Service*, Second Report and Order, FCC 01-1000, ¶¶ 10-11 (Apr. 2, 2001). It is established here that petitioner has engaged in unlicensed broadcasting in violation of 47 U.S.C. 301. Pet. App. A14. To the extent that petitioner disagrees with the congressional choice to render him ineligible for a low power license, he may challenge the statutory bar in federal district court without regard to the exclusive jurisdiction provisions of 47 U.S.C. 402 (1994 & Supp. V 1999). See *Time Warner Entm't Co., L.P.* v. *FCC*, 93 F.3d 957, 965 (D.C. Cir. 1996). Because petitioner's ineligibility now rests upon a statute that petitioner may challenge in district court, the court of appeals' jurisdictional ruling has little future significance so far as petitioner's individual circumstances are concerned.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

JACOB M. LEWIS
MARK S. DAVIES
Attorneys

AUGUST 2001